Supreme Court, U.S.
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No. 87-820

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

EDNA S. KELLAM, KATHRYN L. KELLAM and JAMES L. KELLAM,

Appellants,

v.

JAMES P. PFEIFER, SHIRLEY A. PFEIFER, GARRETT K. SPATES, HELEN M. SPATES, THOMAS L. SULLIVAN, PATRICIA J. SULLIVAN, CHRIS LOUKAS, SAFECO TITLE INSURANCE COMPANY, INC., SAFECO BONDING COMPANY, INC., BIRTH DEVELOPMENT COMPANY, INC., RED CORPORATION, BLUE CORPORATION, ROE COMPANY, a co-partnership, RICHARD ROE I to RICHARD ROE X, doing business as ROE COMPANY, a co-partnership, JOHN DOE 2 to JOHN DOE 100, WILLIAM L. DIETERLE,

Appellees.

ON APPEAL FROM THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT OF CALIFORNIA
DIVISION II

MOTION TO DISMISS

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DIVISION II

MOTION OF SAFECO TITLE INSURANCE CO., INC. TO DISMISS

Pursuant to Rule 16.1, appellee Safeco Title Insurance Co., Inc., respectfully requests this Honorable Court to dismiss the appeal now pending

on the grounds that the federal questions presented were not properly presented to nor passed upon by the California courts; that the judgment rests on an adequate non-federal basis; and that the federal questions presented are so unsubstantial as to require no further argument.

STATEMENT OF FACTS

This is actually the third action in which the appellants Edna S. Kellam, Kathryn L. Kellam and James L. Kellam (the "Kellams") have challenged the validity of a single non-judicial foreclosure sale held in December of 1974 pursuant to a deed of trust.

The property that was the subject of the sale had been owned by the Kellams. It was purchased at a non-judicial foreclosure sale by appellees,

James P. Pfeifer and Shirley A. Pfeifer ("the Pfeifers"), the holders of a third trust deed on the property. After the Pfeifers foreclosed on the property, they were constrained to bring an unlawful detainer action against the Kellams in order to obtain possession. In that unlawful detainer action, the Kellams defended by alleging that the note and third trust deed were illegal; that the Pfeifers were not the assignees with the beneficial interest under the note and third trust deed; that Safeco Title Insurance Co., Inc. ("Safeco") had failed to conduct the foreclosure sale in conformity with California law; that the Pfeifers were not bona fide purchasers of the property; that the Pfeifers were not the owners of the property; and that the California trial court, as a matter of state law, did not have jurisdiction over the case. The

trial court decided the unlawful detainer action against the Kellams. The Kellams initiated an appeal of that action, but subsequently abandoned it.

On August 23, 1974, approximately a week after losing the unlawful detainer action, the Kellams filed a separate complaint in the Superior Court of California, County of Riverside (since referred to by the parties as "Kellam I"). That case sought cancellation of "void instruments," quiet title, slander of title, and equitable relief from the unlawful detainer judgment. The Kellams never asserted any constitutional issues in Kellam I. Safeco and one of its former employees, Chris Loukas, were served with process in Kellam I in December of 1975. In 1979, Loukas was dismissed as a defendant for plaintiff's failure to

return service of process within three years, as required by California law.

Kellam I was the subject of a motion for judgment on the pleadings brought by all of the defendants when the case ultimately came to trial in 1979. The California trial court granted the motion and a judgment of dismissal was entered. The judgment in Kellam I was affirmed by a decision of the California Court of Appeal on May 17, 1982. The Kellams did not pursue further review of that appellate court decision.

In 1979 while the motion for judgment on the pleadings was pending, the Kellams filed a second action ("Kellam II") against the defendants and appellees in this action.

The appeal currently before this Court concerns Kellam II. The second amended complaint in Kellam II alleged seven state law causes of action. Those were: (1) conspiracy and slander of title; (2) cancellation of void deed; (3) cancellation of voidable deed; (4) equitable relief from judgment; (5) equitable relief from judgment; (6) constructive trust; and (7) indemnity. Safeco and the Pfeifers demurred to the second amended complaint on the general grounds of a failure to state a cause of action, res judicata, statute of limitations and on the special ground of another action pending. The trial court sustained Safeco's demurrer without leave to amend.

The Kellams appealed to the California Court of Appeal. The Court of Appeal affirmed the trial court's decision on the ground that the Kellams'

complaint failed to allege a cause of action against either Safeco or the Pfeifers. See, May 15, 1987 Unpublished Opinion of the Court of Appeal, Fourth District, Division II in the State of California #E001226 at p. 7.

It was not until after that opinion, more than a decade after the start of this litigation, that the Kellams attempted to manufacture a federal issue. The Kellams, in a petition for rehearing to the Court of Appeal, did so by raising, for the first time, a federal due process challenge to the courts' decisions upholding California non-judicial foreclosure law. See, Jurisdictional Statement for Appellant ("Jurisdictional Statement") at p. 26. That petition for rehearing was summarily denied. The Kellams then petitioned the California Supreme Court for review of the decision of the Court

of Appeal. On August 12, 1987, that petition was also summarily denied.

Although they never raised federal issues in either the trial court or in two separate hearings before California Courts of Appeal, the Kellams now attempt to invoke the jurisdiction of this Court to hear federal questions -- questions which are neither substantial nor were ever passed upon by a California court in this litigation.

ARGUMENT

I. The Federal Questions Appellants Attempt To Manufacture Were Not Presented To The California Court Of Appeal In A Timely Manner And Were Never Passed Upon. Accordingly, They Cannot Be Used To Invoke The Jurisdiction Of This Court.

In order to invoke the appellate jurisdiction of the United States Supreme Court, an appellant must have raised the federal questions at issue in the state courts in accordance with state procedures. Beck v. State of Washington, 369 U.S. 541, 549-554 (1962). Further, the federal questions must have been passed upon by the state court. 28 U.S.C.A. §1257(2) (West 1966 & Supp. 1987); Illinois v. Gates, 462

U.S. 213, 218 (1983) [The Supreme Court will not decide claims "not pressed nor passed upon" in state court. Id. at 219.]; Hanson v. Denckla, 357 U.S. 235, 243-244 (1958); Sup. Ct. R. 16.1(b). The Kellams' petition for appeal fails both of these tests. As readily can be seen from the text of the California Court of Appeal Decision #E001226 filed May 17, 1987, that court's opinion is completely a matter of state law. See, unpublished opinion of California Court of Appeal, Fourth District, Division II, in the State of California #E001226, filed May 17, 1987, at pp. 5-15.

At no time in the proceedings before the Court of Appeal issued its opinion did the Kellams raise, nor did the court consider, the alleged federal questions that the Kellams now attempt to raise before this Court. Indeed, by the Kellams' own admission, the first

time any federal issues were raised during this protracted and duplicative litigation was in their petition for rehearing in the Court of Appeal of California. Jurisdictional Statement at p. 26.

The Court of Appeal's decision not to consider the petition for rehearing based upon the new contentions of the Kellams was in complete conformity with California law. It is well established that a California appellate court will not consider matters that were not presented to the trial court. Parker v. City of Fountain Valley, 127 Cal. App. 3d 99, 117; 179 Cal. Rptr. 351, 361-362 (1981). Further, a Court of Appeal will not grant a rehearing on issues raised for the first time in a petition for rehearing. County of Sacramento v. Loeb, 160 Cal. App. 3d 446, 459 n.5, 206 Cal. Rptr. 626, 635 (1984); People ex.

rel. Dept. of Public Works v. Mascotti, 206 Cal. App. 2d 772, 779-780; 23 Cal. Rptr. 846, 851 (1962). [Opinion on petition for rehearing is not set forth in California Reporter.] Nor will this Court consider an appeal of an issue which was only presented to the state court by means of a petition for rehearing. Prudential Federal Savings and Loan Association v. Flanigan, 107 S. Ct. 38 (1986); Radio Station WOW v. Johnson, 326 U.S. 120, 128 (1945).

Since the Kellams have attempted to raise federal issues which were not properly presented to the California courts for decision and were not passed upon by any California court in this litigation, the appeal is without merit.

II. The Decision of the California Court of Appeal Rests on an Adequate Non-Federal Basis.

This Court will not review a judgment of a state court if the judgment rests on an adequate state law ground. Hammerstein v. Superior Court of California, 340 U.S. 622, 623 (1950); Sup. Ct. R. 16.1(b).

The state court decision which is the subject of this appeal rests entirely on state law. See, unpublished opinion of the Court of Appeal, Fourth District, Division II in the State of California #E001226, filed May 15, 1987. The Court of Appeal addressed the propriety of the trial court's application of the doctrine of judicial notice; the validity of the Kellams' main cause of action for conspiracy and slander of title; the nature of the relationship

between a trustee under a deed of trust and the trustor; and the soundness of the trial court's decision to sustain a demurrer to the Kellams' complaint after numerous opportunities to amend. No issue of federal law was raised or dealt with by the court.

Since the decision of the Court of Appeal rests solely on state law, there is no basis for this Court to exercise its jurisdiction.

III. The Questions Presented by Appellants Do Not Present Substantial Federal Questions.

In addition to the fact that the Kellams did not properly present their federal questions to the courts below and to the fact that the decision of the Court of Appeal rests entirely on state law, the appeal presented by the Kellams

does not present substantial federal questions.

In Zucht v. King, 260 U.S. 174 (1922), this Court ruled that a federal issue raised by means of writ of error could not be considered when it appeared that the constitutional issues were not substantial. 260 U.S. at 176. In Zucht, a litigant petitioned this Court for an injunction, as well as other relief, against the enforcement of a City ordinance requiring vaccination of all persons attending public schools. Petitioner had raised the constitutional issues in the Texas state courts, but a demurrer to her complaint had been sustained by the Texas Supreme Court. Petitioner's petition for writ of certiorari to this Court was dismissed for failure to comply with the Supreme Court rules. As a result, the petitioner sought review by means of a writ

of error. The petition for writ was dismissed. In doing so, this Court held that a portion of her petition was not within the jurisdiction of the Court, stating:

> [A]lthough the validity of a law was formally drawn into question, it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not, and was not, at the time of granting the writ [of error], substantial in character. [Citation omitted.] [Id. at 176.]

Although it is not entirely clear, the main thrust of the Kellams' appeal to this Court appears to be that California case law and California statutory law controlling non-judicial foreclosure sales, taken together, create an unconstitutional denial of due process; presumably a denial of the guarantee against the taking of property without due process. See, Jurisdictional Statement at p. i; U.S.

Const. amend. XIV, § 1. This Court has already addressed a similar issue of California law and declined to hear an appeal of the matter because of the lack of a substantial federal issue. Garfinkle v. Superior Court, 21 Cal. 3d 268; 146 Cal. Rptr. 208, 578 P.2d 925, appeal dismissed, 439 U.S. 949 (1978) reh'g. denied, 439 U.S. 1104 (1979).

In Garfinkle, the statutory scheme permitting the sale of property by means of a non-judicial foreclosure sale was attacked as being in violation of the due process guarantees of the fourteenth amendment of the United States Constitution and in violation of the California Constitution. The California Supreme Court held that the non-judicial foreclosure procedure constitutes private action and therefore is not subject to the requirements of the fourteenth amendment. Garfinkle v.

Superior Court, 21 Cal. 3d at 281. This Court refused to hear the appeal of Garfinkle on the ground that it did not present a substantial federal question. 439 U.S. 949. The Kellams are apparently attempting to resurrect substantially the same issues this Court has already held to be unworthy of review. The propriety of a non-judicial foreclosure sale did not present a substantial federal question when Garfinkle was decided and the Kellams have not presented one reason why this case should be treated differently.

The Kellams have also claimed that a question of constitutional dimensions has been created by the trial court's application of the substantive law of res judicata and law of the case. Jurisdictional Statement at p. i.

In support of this contention, the Kellams have cited two cases which

generally state the rule that due process requires a litigant be given "an opportunity to present every available defense." See, Linsay v. Normet, 405 U.S. 56, 66 (1972); American Surety v. Baldwin, 287 U.S. 156, 168 (1932). Neither case even remotely suggests a state court's use of state common law doctrines, to dispose of a case before it, creates a federal question.

In Linsay, appellants were a class of month-to-month tenants who refused to pay their rent because of alleged substandard living conditions. Appellants filed a declaratory relief action challenging an Oregon statutory scheme which, among other things, limited the defenses a tenant could raise in a wrongful detainer action. This Court held that that portion of the Oregon statutes did not violate due process. 405 U.S. at 65. In reaching

that holding, it was noted that as a general rule a litigant was entitled to present every available defense. Id. at 66. This Court reasoned, however, that since the defenses appellant wished to raise could have been asserted in a different action, due process was satisfied.

American Surety 287 U.S. 156 (1932), is similar. In American Surety, a surety company sought relief from a state court judgment on the ground that the judgment was void under the due process clause of the fourteenth amendment. The company had issued an appeal bond to a defendant in a lawsuit to secure the amount of a state court judgment entered against him while he pursued an appeal. The defendant's appeal was decided against him and, as a result, plaintiffs obtained a judgment against the surety company under the

terms of the bond. After being denied relief from the judgment in the state courts, the surety company filed an action in federal court to enjoin the enforcement of the judgment. In federal court, the company contended that it was denied due process because it was not given notice of the hearing in which judgment was entered against it. The federal court of appeals granted the relief requested.

This Court reversed the decision of the federal court of appeals, holding that because the decisions of the state courts were res judicata under state law and because the constitutional issues were not presented in those proceedings, an exercise of jurisdiction to hear the federal issues would have been improper. This Court further held that because state law provided the company with an opportunity to present its

defenses by means of an appeal after judgment, due process was satisfied. 287 U.S. at 168-169. The fact that the company had not availed itself of that process was irrelevant. Id. It is in this context that the Court made the general statement "due process requires that there be an opportunity to present every available defense; but it need not be before entry of judgment." Id. at 168.

There is nothing in the cases cited by the Kellams which could conceivably serve as a basis to claim that the application of the state law doctrines of res judicata and law of the case can be the basis for a substantial federal question. The Kellams have had their day in court. It is disingenuous for them to now claim they have been denied due process.

The Kellams' petition to this Court addresses issues that do not raise substantial federal issues. Their appeal borders on the frivolous.

IV. Appellants' Petition Should Be Dismissed.

The Kellams have attempted to invoke the appellate jurisdiction of this Court under the provisions of Title 28 United States Code Section 1257(2). Section 1257(2) states:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of it being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. [Id.]

As discussed above, the issues now advanced by the Kellams were, in accordance with state law, never decided by the California courts. Consequently, the Kellams cannot possibly rely on Section 1257(2) as a basis to seek appellate review of this case.

Title 28 United States Code Section 2103, provides:

> If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of the state, or from a United States court of appeals, in a case where the proper mode of a review is by a petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damage

for his delay, and single or double costs. [Id.]

If this Court treats the Kellams' appeal as a writ of certiorari, Safeco respectfully submits that the writ should be denied for all the reasons set forth above.

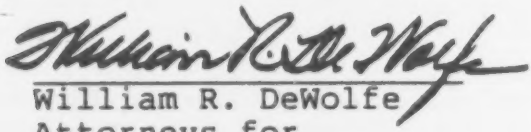
CONCLUSION

In view of the above, Safeco respectfully requests that the appeal of the Kellams be dismissed.

DATED: January 5, 1988

Respectfully submitted,

BEST, BEST & KRIEGER

By: 

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A P P E N D I X

List of Parent and Affiliate Corporations

(Pursuant to Supreme Court Rule 28.1)

APPENDIX

Pursuant to Rule 28.1, Appellee Safeco Title Insurance Co., Inc. submits the following list of parent and affiliate corporations:

Appellee:

Safeco Title Insurance Co., Inc., a California corporation

Parent corporation of Appellee:

Chicago Title and Trust Company, an Illinois corporation

Holding company of Appellee's parent corporation

Alleghany Corporation, a Delaware corporation.

Affiliate corporations of Appellee: (companies also held by Allegheny Corporation and that are not wholly-owned subsidiaries of Appellee):

1) MSL Industries, Inc., a Delaware corporation

2) MSL Acquisition Corporation, a Delaware corporation

Affiliate corporations
of Appellee

(continued)

3) MSL/EGS Corporation, a Delaware corporation

4) MSL/Southwestern Corporation, a Delaware corporation

5) MSL Capital Recovery Corporation, a Delaware corporation

6) J & E Corporation, a Tennessee corporation

7) Allied Structural Steel Corporation, a Tennessee corporation

8) Bibb Steel and Supply Company, a Delaware corporation

9) MSL Property Holdings, Inc., a Delaware corporation

10) The Shelby Insurance Company, an Ohio corporation

11) Shelby Financial Corporation, an Ohio corporation

12) Millsboro Development Corporation, an Ohio corporation

13) Insura Property and Casualty Insurance Company, an Ohio corporation

14) IPBS, Inc., an Ohio corporation

Affiliate corporations of Appellee

(continued)

15) Affirmative Insurance Company, an Ohio corporation

16) Shelby Printing, Inc., an Ohio corporation

17) Chicago Title Insurance Company, a Missouri corporation

18) Alexander Title Agency, Inc., a Virginia corporation

19) Approved Title Corp., a New Hampshire corporation

20) Associated Abstract Company, a Delaware corporation

21) C.T.I. Properties, Inc., a California corporation

22) Chicago Title Agency of Arizona, an Arizona corporation

23) Chicago Title Company of San Diego, Inc., a California corporation

24) Chicago Title Company, a California corporation

25) Tri-Safe, Inc., a non-profit California corporation

26) Chicago Title Insurance Company, a Missouri corporation

27) Chicago Title Company, a California corporation

Affiliate corporations
of Appellee

(continued)

28) Title Records, Inc., a California corporation

29) Chicago Title Company of Alameda, Inc., a California corporation

30) Chicago Title Insurance Company of Puerto Rico, Puerto Rico

31) Citizens Title Service Corporation, an Illinois corporation

32) Creative Land Services, Inc., a Minnesota corporation

33) Experienced Title Company, a California corporation

34) Johnson County Title Company, a Kansas corporation

35) Land Title of Kentucky, a Kentucky corporation

36) McHenry County Title Company, an Illinois corporation

37) S. T. & A. Corp., a New Jersey corporation

38) White River Abstract & Title Co., Inc., an Indiana corporation

39) CTP, Inc., a Florida corporation

40) Dallas Seven Index, Inc., a Texas corporation

Affiliate corporations
of Appellee

(continued)

41) Jax Fax, Inc., a Florida corporation

42) Joint Title Plans and Associations

43) Kansas City TItle Data, Inc., a Missouri corporation

44) Orange County Title Insurance Shippers Association, a California corporation

45) SKLD, Inc., a Colorado corporation

46) Take-Off, Inc., a non-profit Colorado corporation

47) Title Data, Inc., a Texas corporation

48) Chicago Title and Trust Company Foundation, a charitable foundation

49) Estate Services Company of America, an Illinois corporation

50) Fleet Enterprises, Inc., a New York corporation

51) Iowa Land Services Company, an Iowa corporation

52) L C Investment Corporation, an Indiana holding company

53) The Lake County Trust Company, an Indiana corporation

Affiliate corporations of Appellee

(continued)

54) Guardian Title Company of Houston, Inc., a Texas corporation

55) Capital Park Plaza, Inc.

56) Title and Trust Company, an Idaho corporation

57) Pioneer Title Company, a Utah corporation